

# EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT ADA/FEHA LITIGATION\*



**\*...but were afraid to ask...**

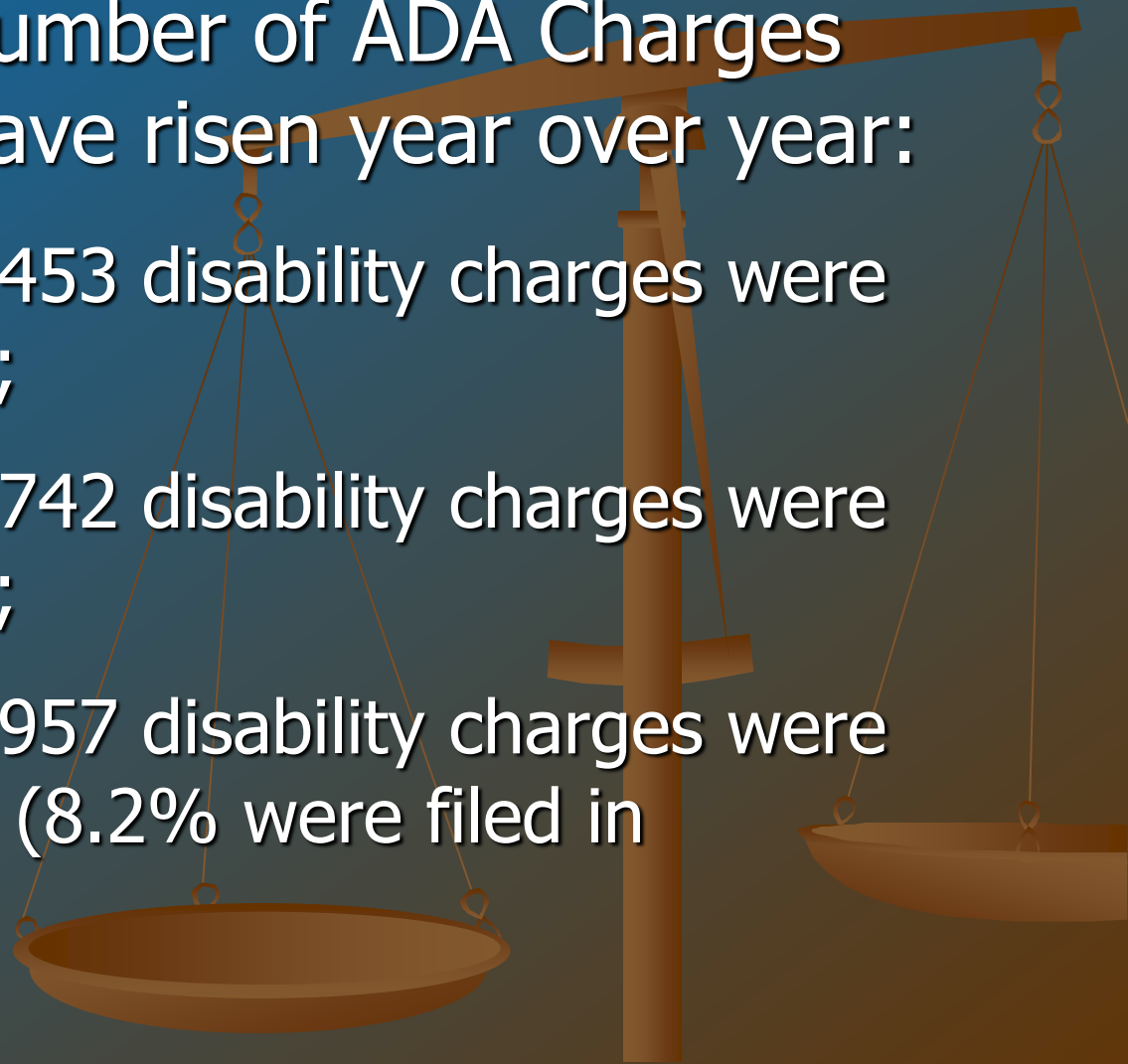
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# ENFORCEMENT TRENDS

Historically, the number of ADA Charges filed with EEOC have risen year over year:

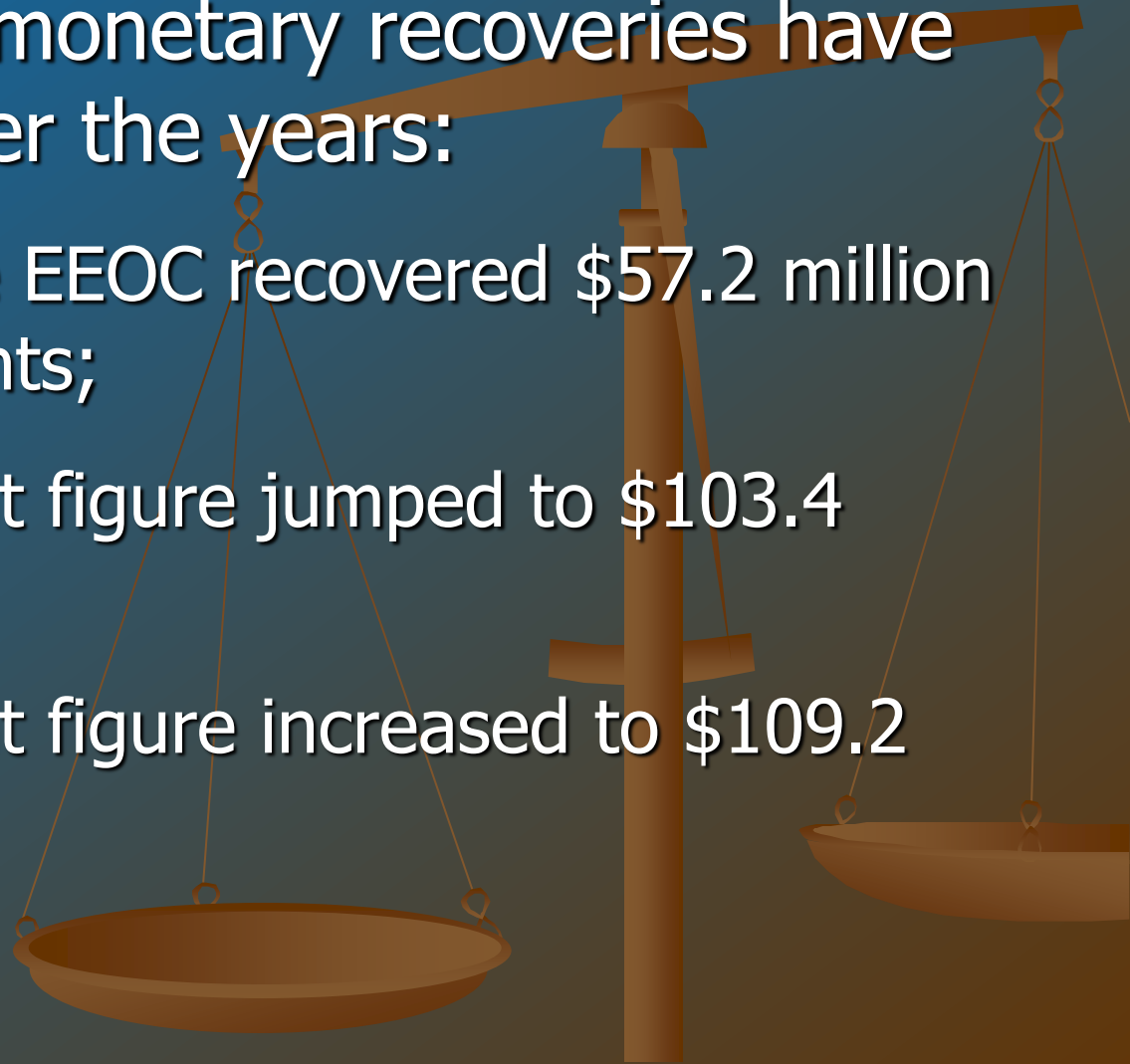
- In FY 2008, 19,453 disability charges were filed with EEOC;
- In FY 2011, 25,742 disability charges were filed with EEOC;
- In FY 2013, 25,957 disability charges were filed with EEOC (8.2% were filed in California).



# ENFORCEMENT TRENDS

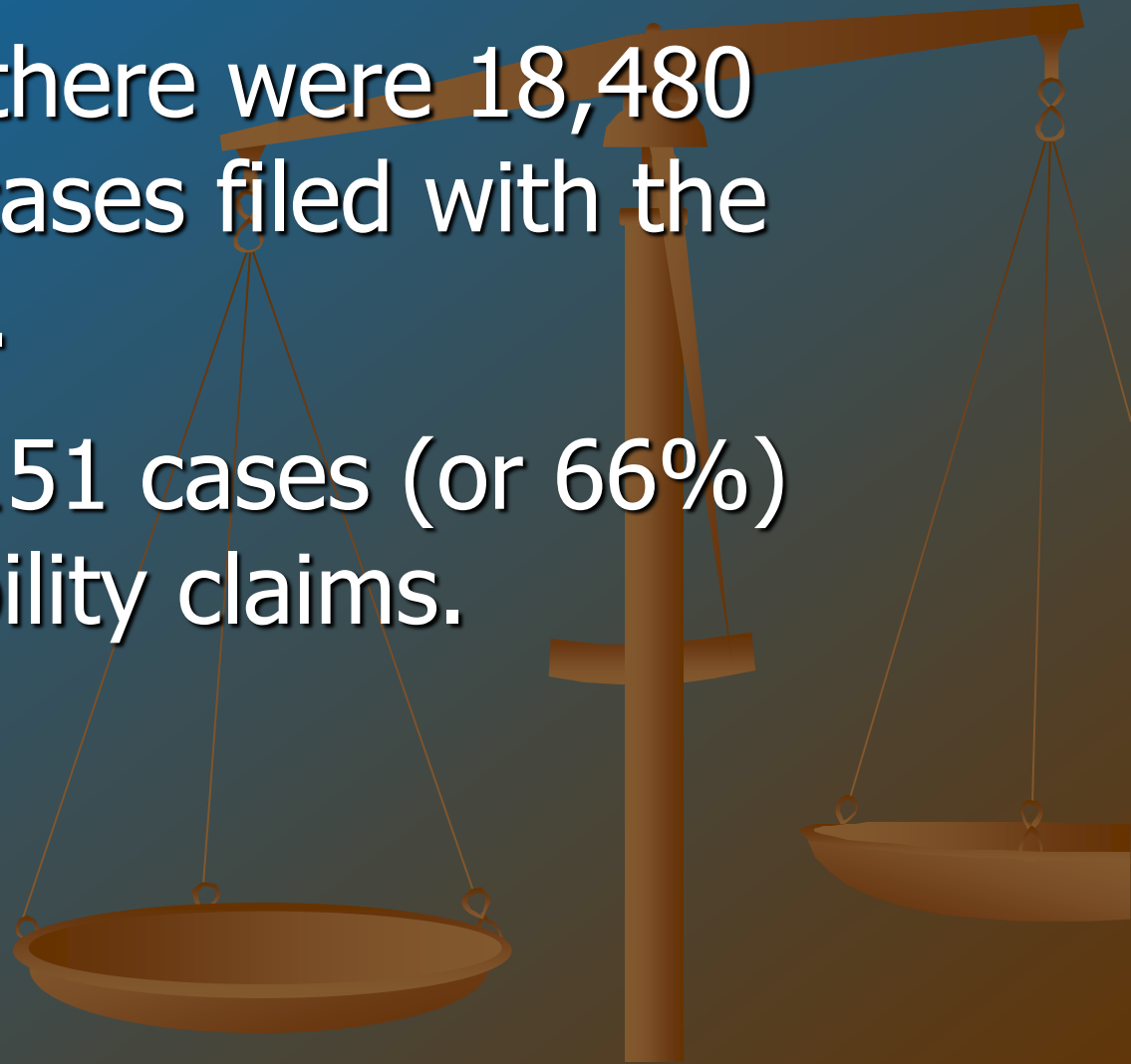
The EEOC's total monetary recoveries have also increased over the years:

- In FY 2008, the EEOC recovered \$57.2 million for ADA claimants;
- In FY 2011, that figure jumped to \$103.4 million;
- In FY 2013, that figure increased to \$109.2 million.



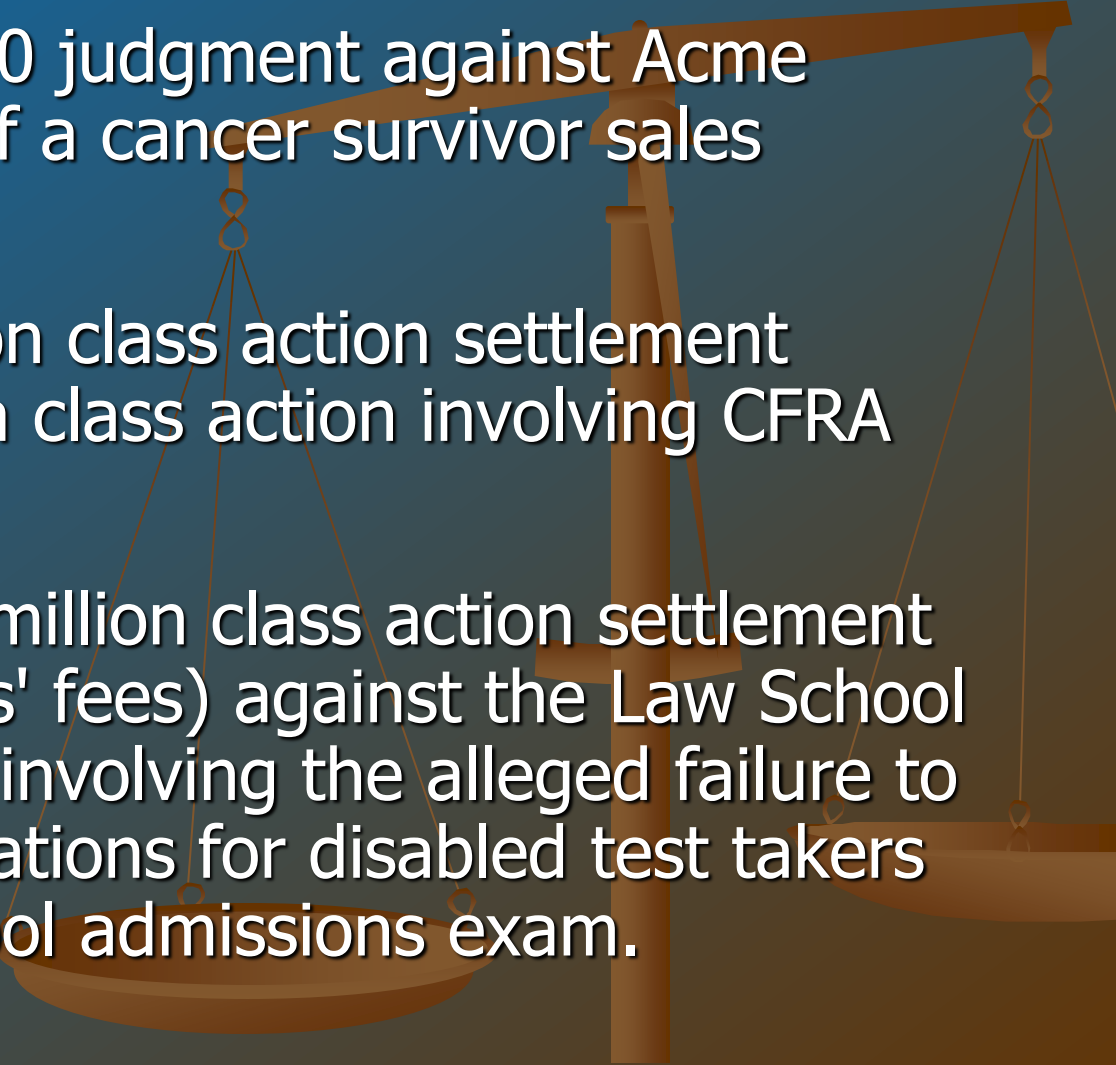
# ENFORCEMENT TRENDS

- In California, there were 18,480 employment cases filed with the DFEH in 2013.
- Of these, 12,151 cases (or 66%) involved disability claims.

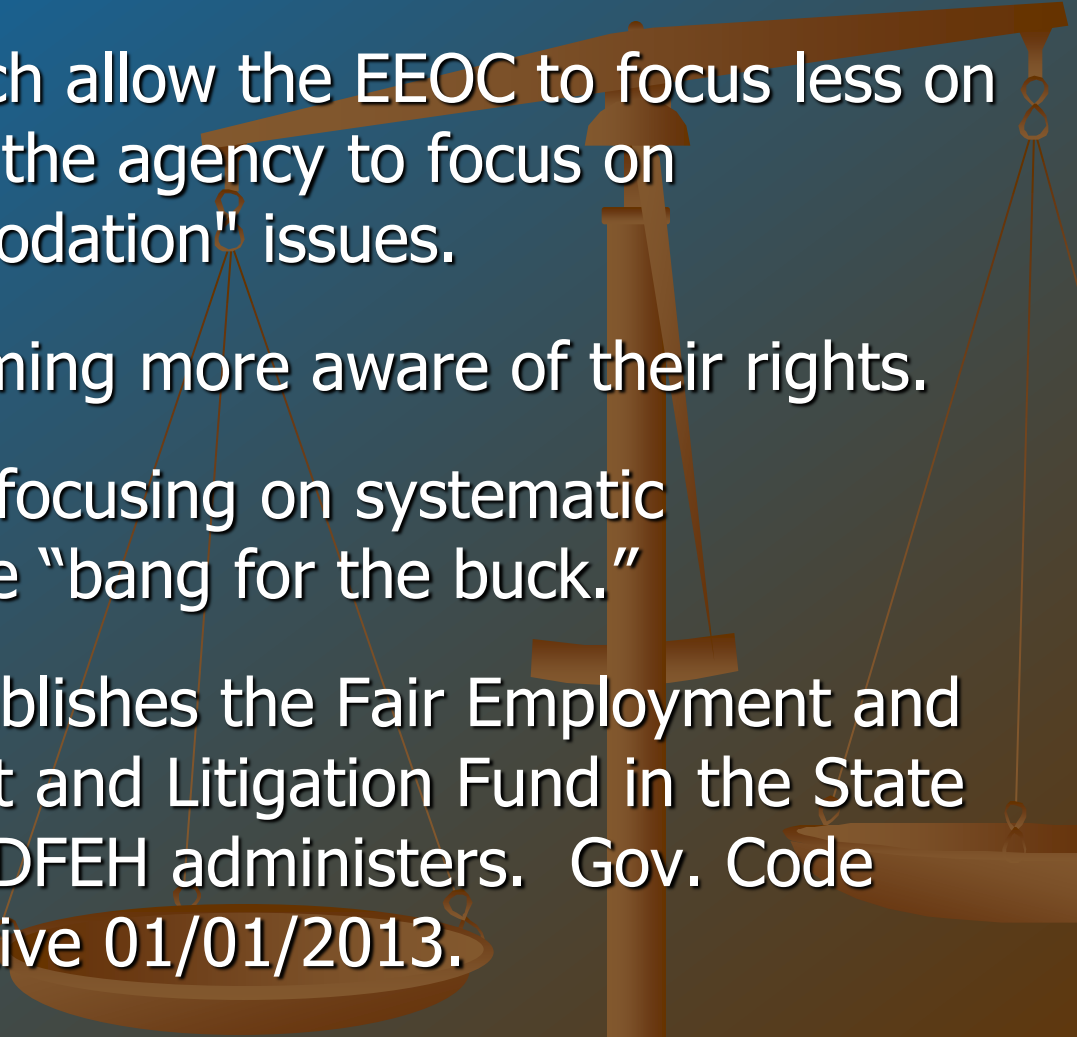




# EXAMPLES OF DFEH PROSECUTIONS

- In 2011, a \$846,300 judgment against Acme Electric on behalf of a cancer survivor sales manager.
  - In 2012, a \$6 million class action settlement against Verizon in a class action involving CFRA leave.
  - This year, a \$8.73 million class action settlement (including attorneys' fees) against the Law School Admission Counsel involving the alleged failure to provide accommodations for disabled test takers taking the law school admissions exam.
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# POSSIBLE REASONS FOR INCREASES

- Changes in ADA which allow the EEOC to focus less on coverage and allows the agency to focus on "reasonable accommodation" issues.
  - Employees are becoming more aware of their rights.
  - EEOC and DFEH are focusing on systematic discrimination – more "bang for the buck."
  - Senate Bill 1038 establishes the Fair Employment and Housing Enforcement and Litigation Fund in the State Treasury, which the DFEH administers. Gov. Code section 12907, effective 01/01/2013.
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# SO WHAT DOES THIS MEAN?

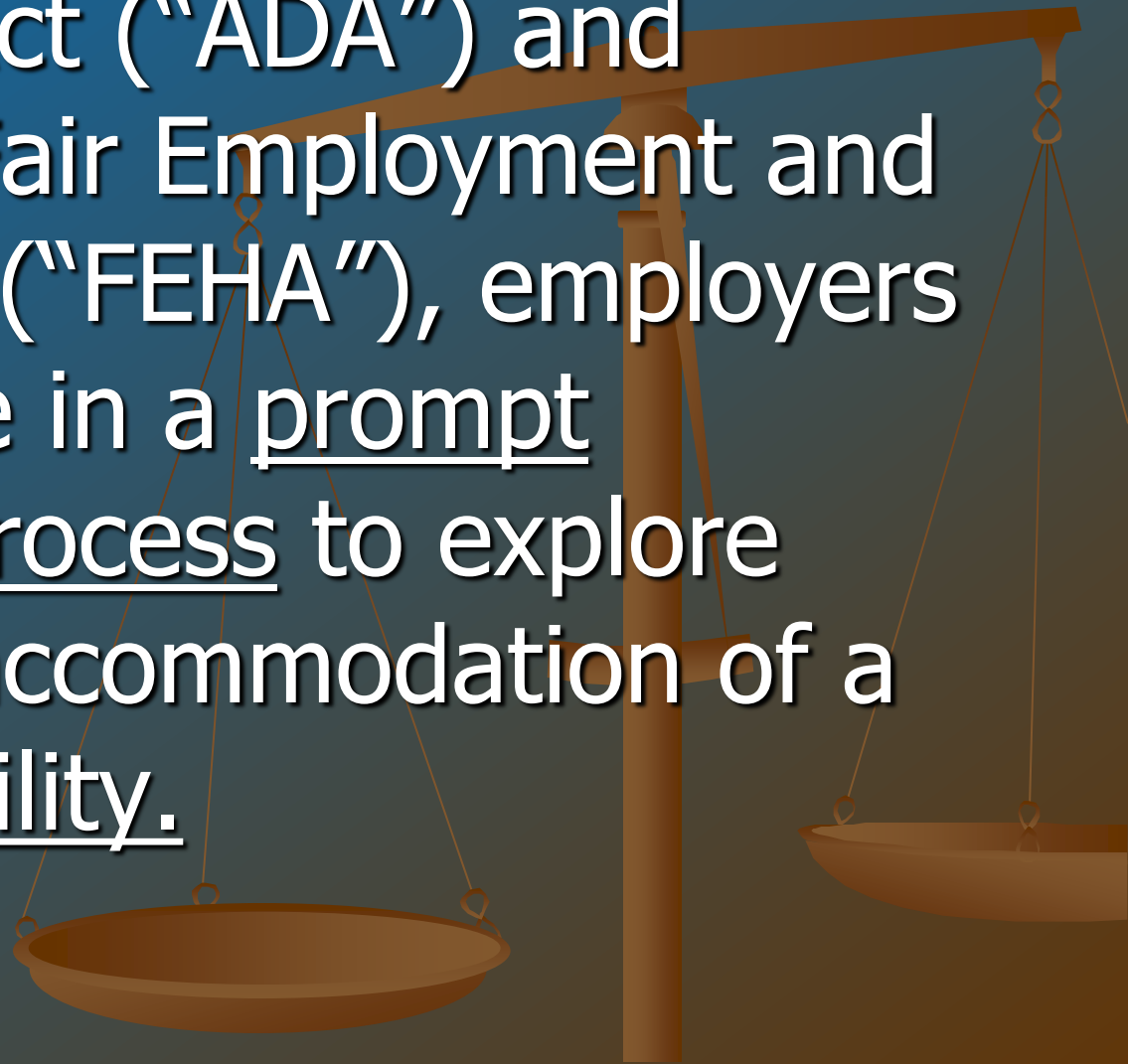


# AN ADA PRIMER





- Under the Americans with Disabilities Act (“ADA”) and California’s Fair Employment and Housing Act (“FEHA”), employers must engage in a prompt interactive process to explore reasonable accommodation of a known disability.

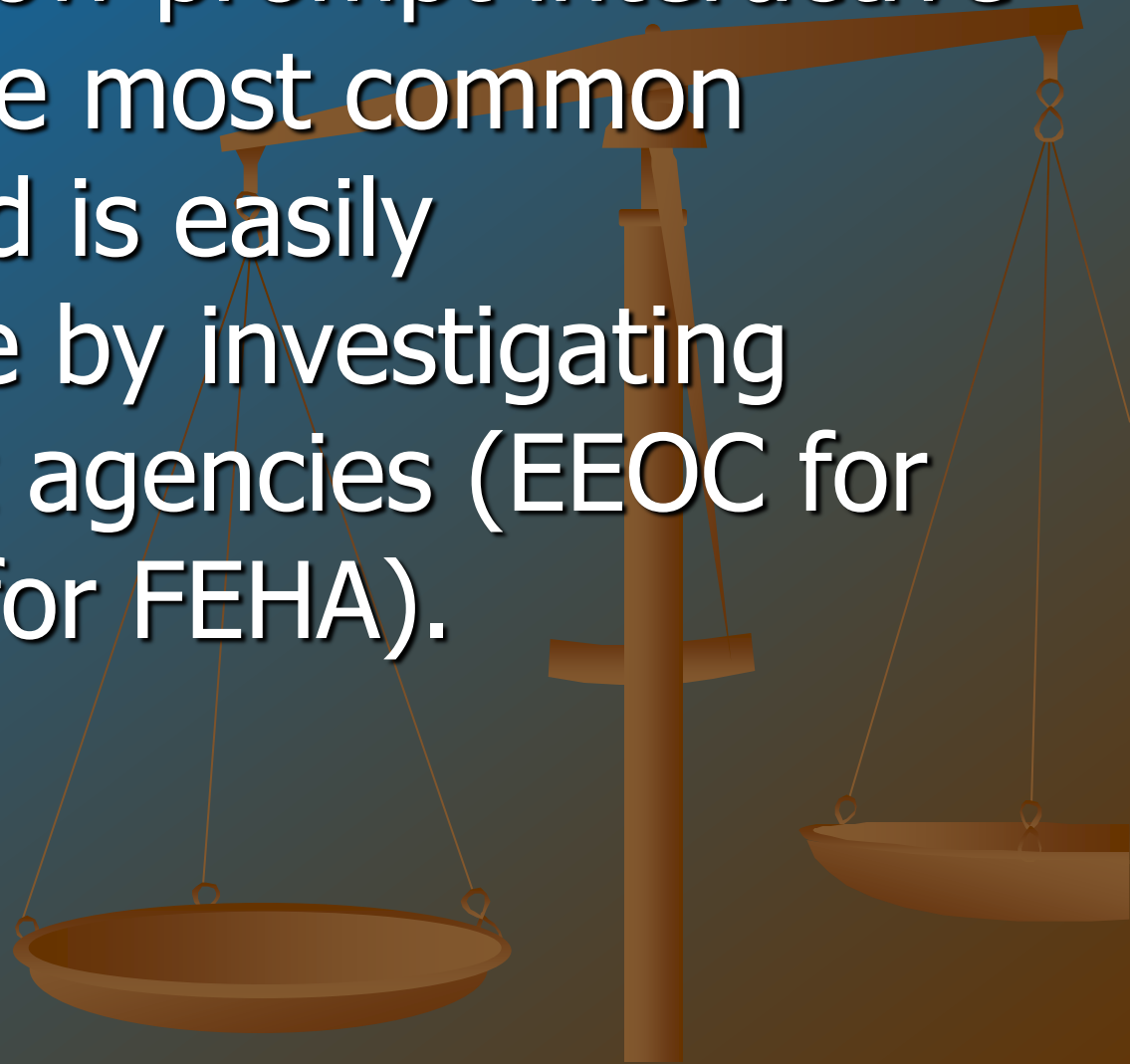


- This is an express requirement.

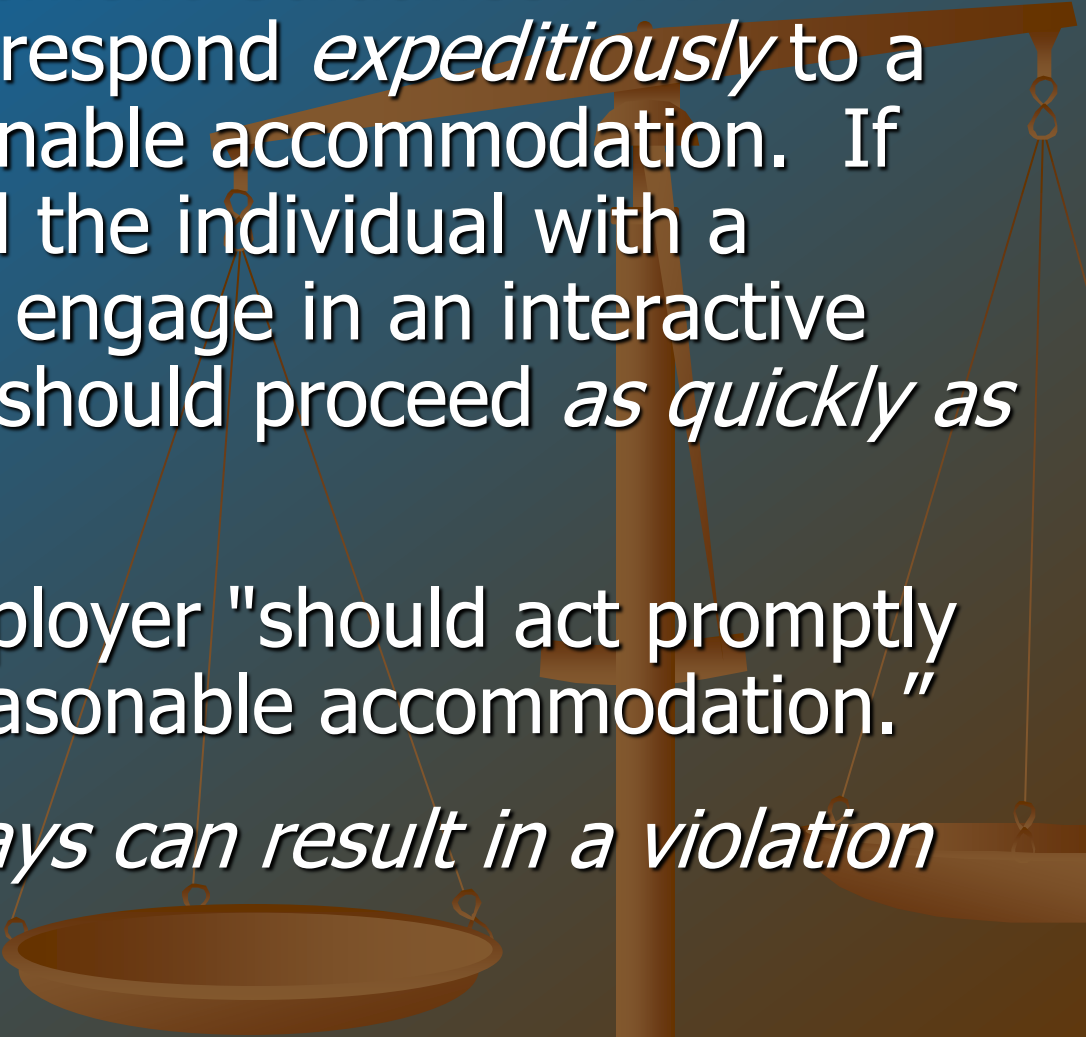




- Failure to show prompt interactive process is the most common violation, and is easily ascertainable by investigating enforcement agencies (EEOC for ADA; DFEH for FEHA).



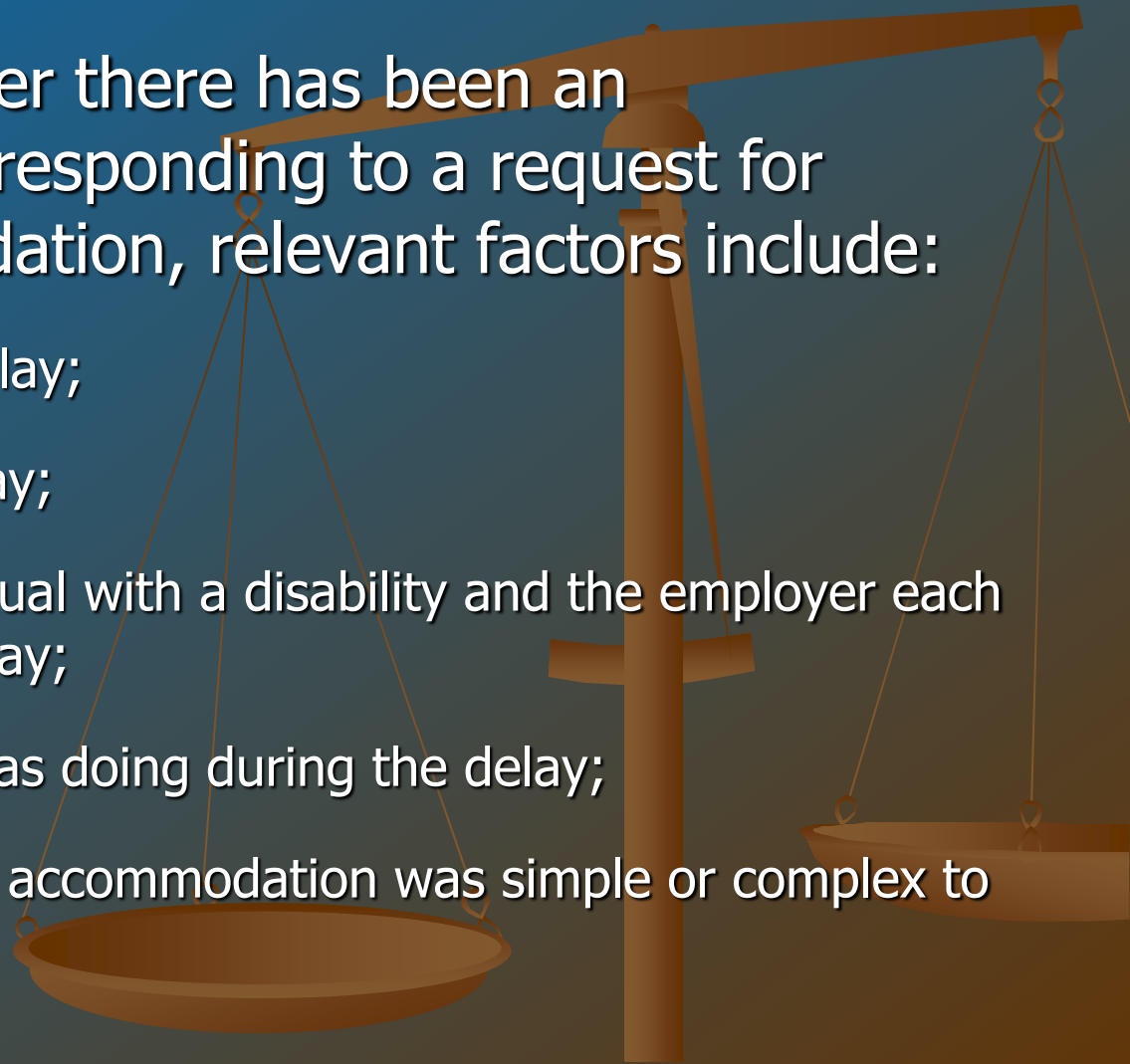
# WHAT IS "PROMPT?"

- Per EEOC Enforcement Guidance: "An employer should respond *expeditiously* to a request for reasonable accommodation. If the employer and the individual with a disability need to engage in an interactive process, this too should proceed *as quickly as possible*."
  - Similarly, the employer "should act promptly to provide the reasonable accommodation."
  - *Unnecessary delays can result in a violation of the ADA.*
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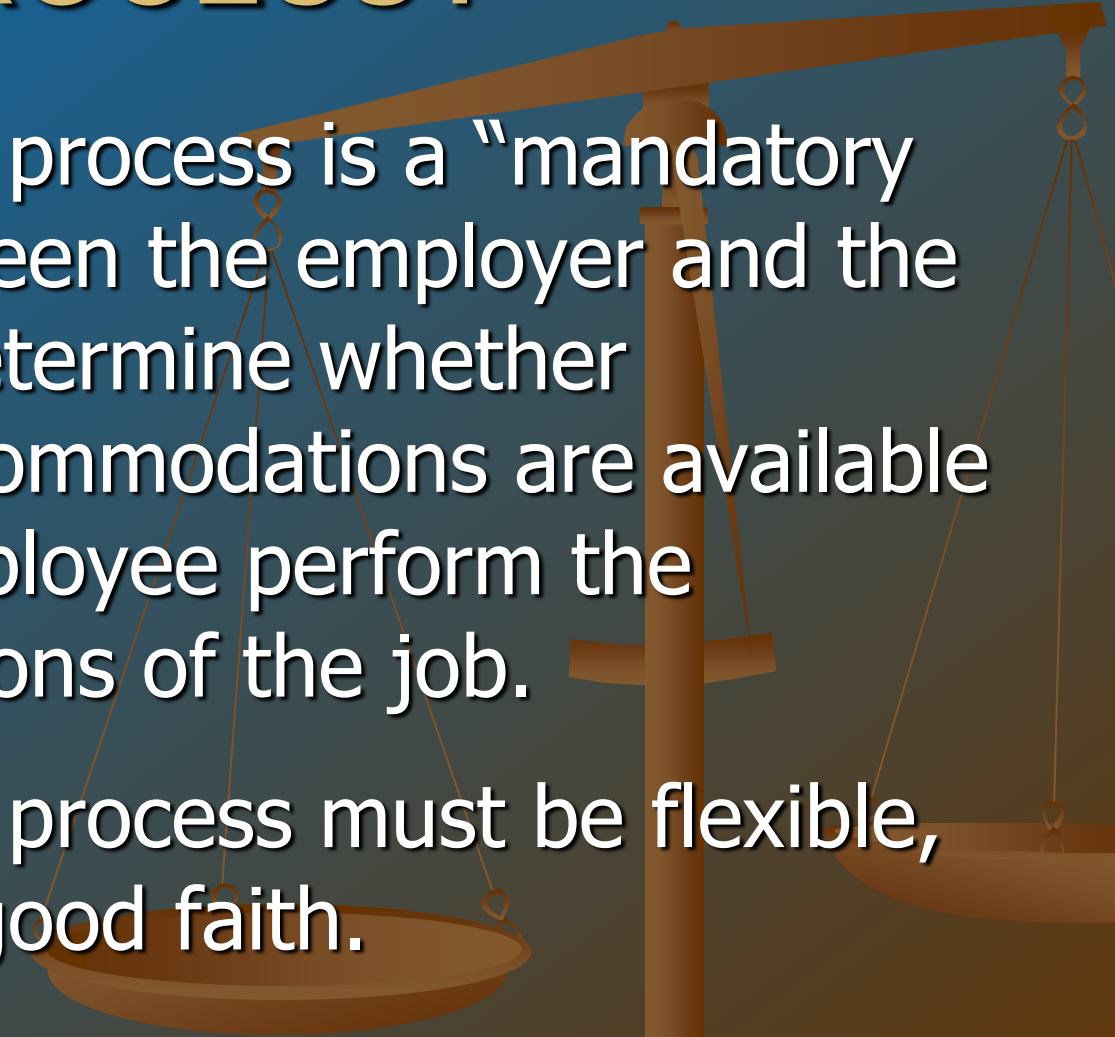
# WHAT IS AN "UNNECESSARY DELAY?"

In determining whether there has been an unnecessary delay in responding to a request for reasonable accommodation, relevant factors include:

- The reason for the delay;
- The length of the delay;
- How much the individual with a disability and the employer each contributed to the delay;
- What the employer was doing during the delay;
- Whether the required accommodation was simple or complex to provide.

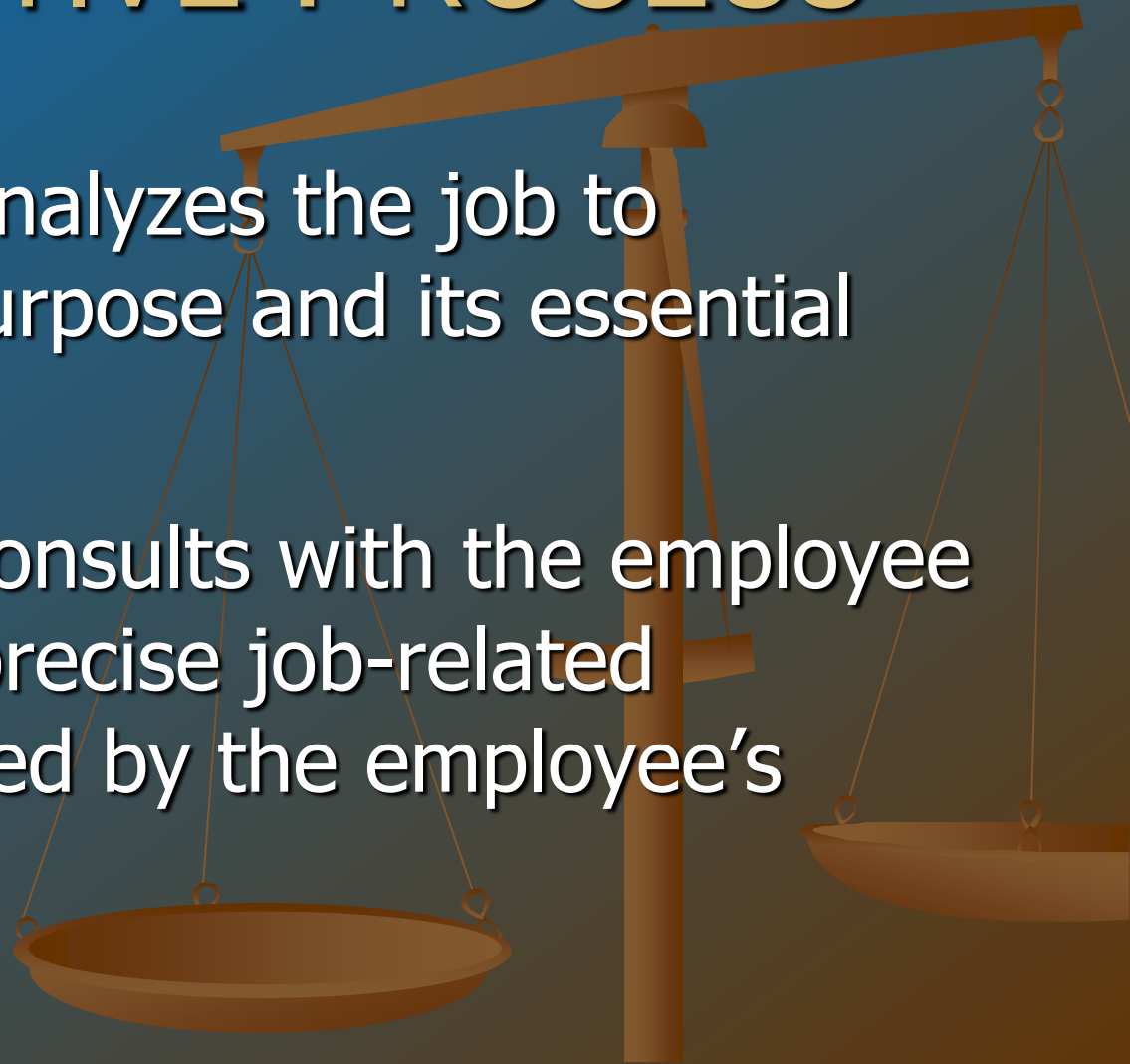


# WHAT IS THE “INTERACTIVE PROCESS?”

- The interactive process is a “mandatory dialogue” between the employer and the employee to determine whether reasonable accommodations are available to help the employee perform the essential functions of the job.
  - The interactive process must be flexible, timely, and in good faith.
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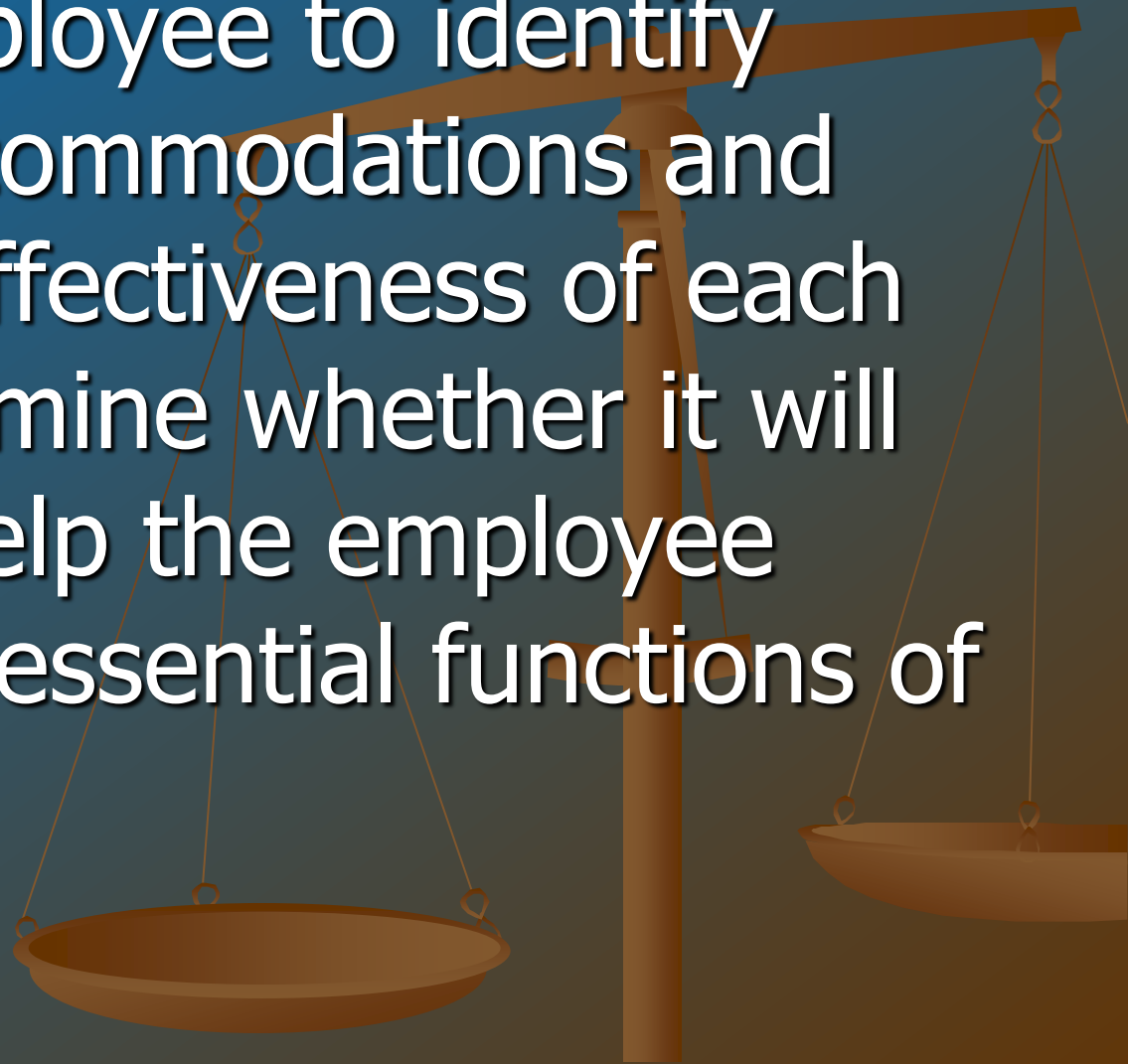
# COMMON STEPS IN THE INTERACTIVE PROCESS

- The employer analyzes the job to determine its purpose and its essential functions.
- The employer consults with the employee to identify the precise job-related limitations caused by the employee's disability.



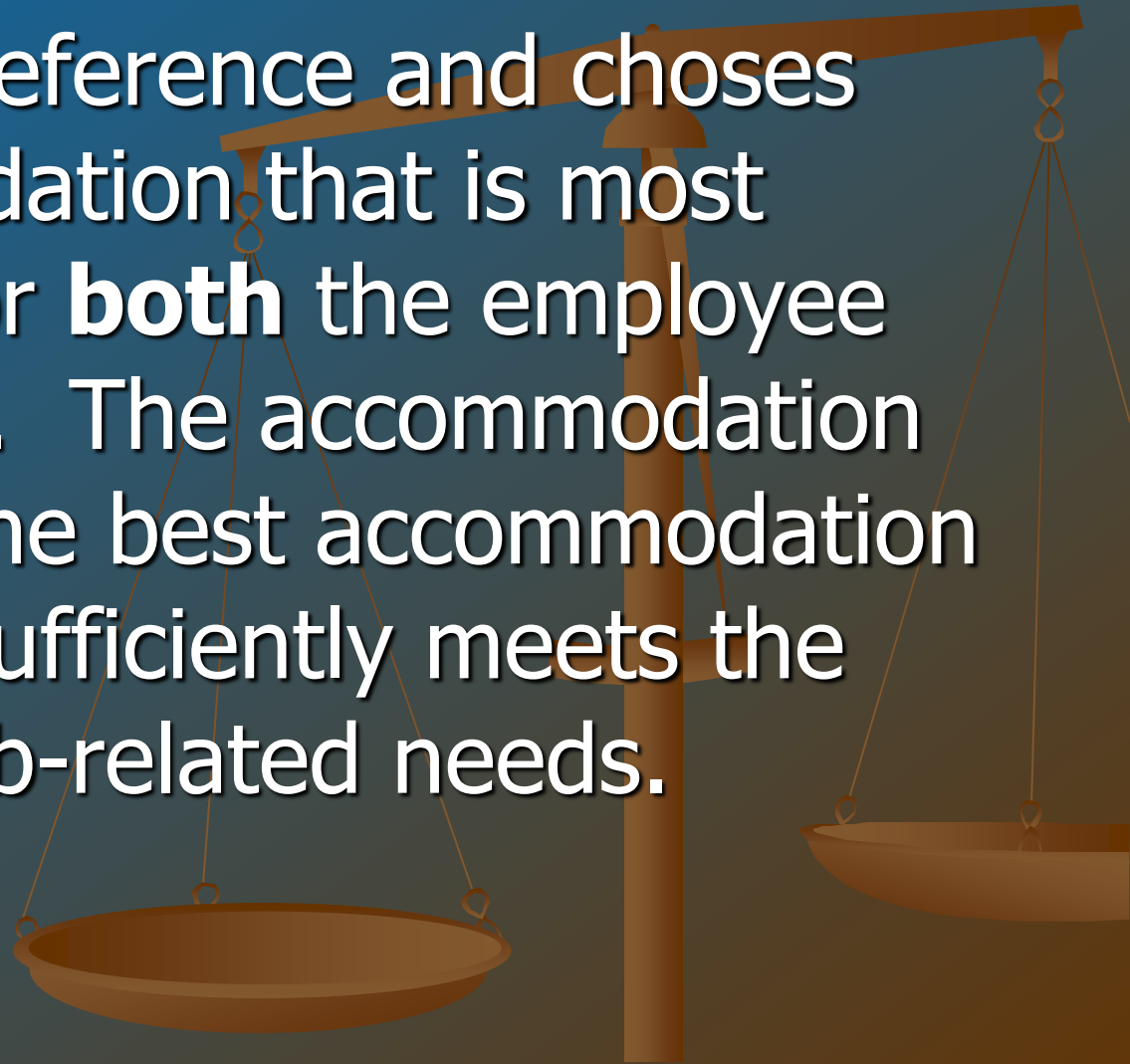


- The employer consults with the disabled employee to identify potential accommodations and assess the effectiveness of each one to determine whether it will effectively help the employee perform the essential functions of the job.

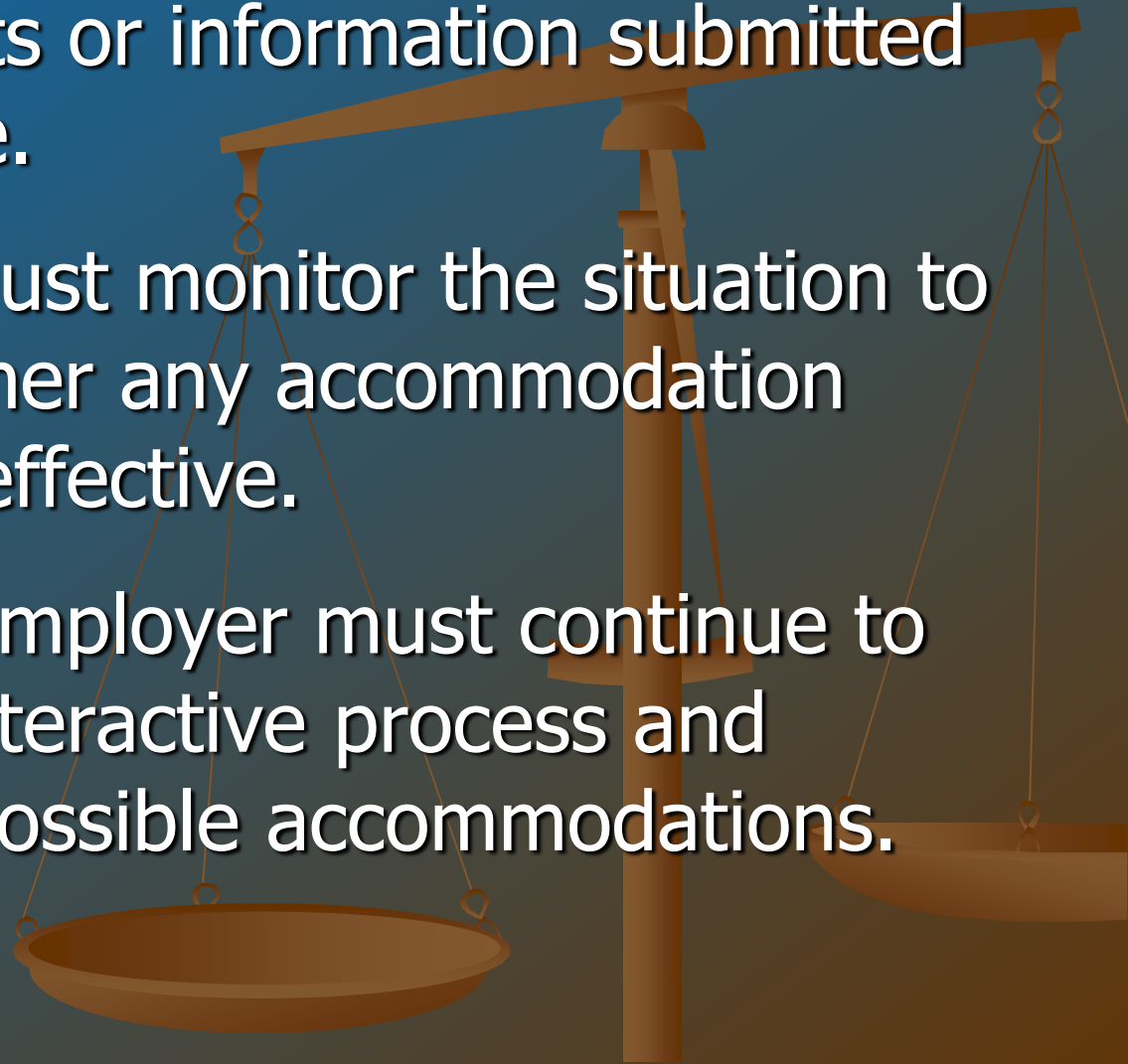




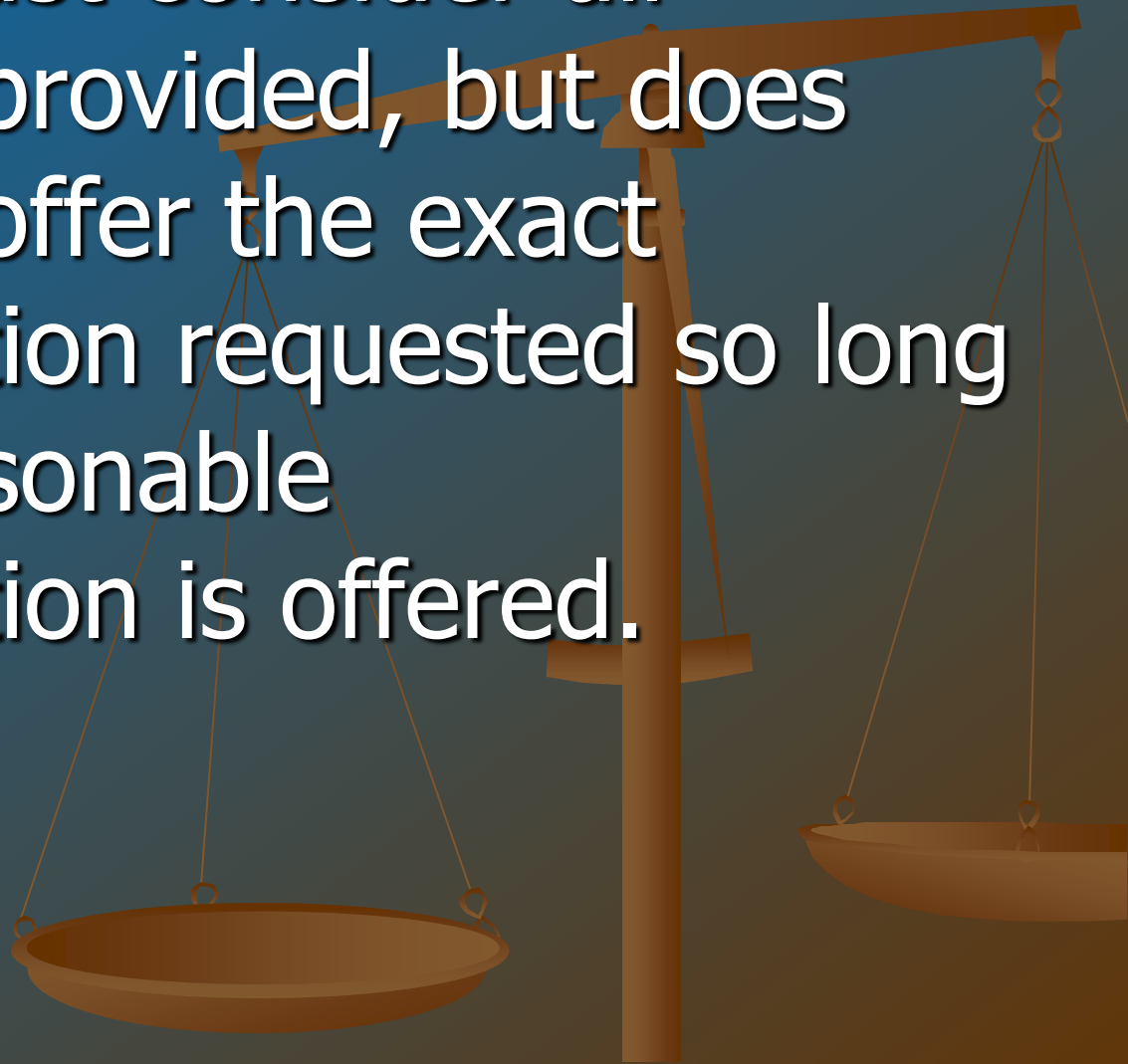
- The employer considers the employee's preference and chooses the accommodation that is most appropriate for **both** the employee and employer. The accommodation need not be the best accommodation as long as it sufficiently meets the employee's job-related needs.

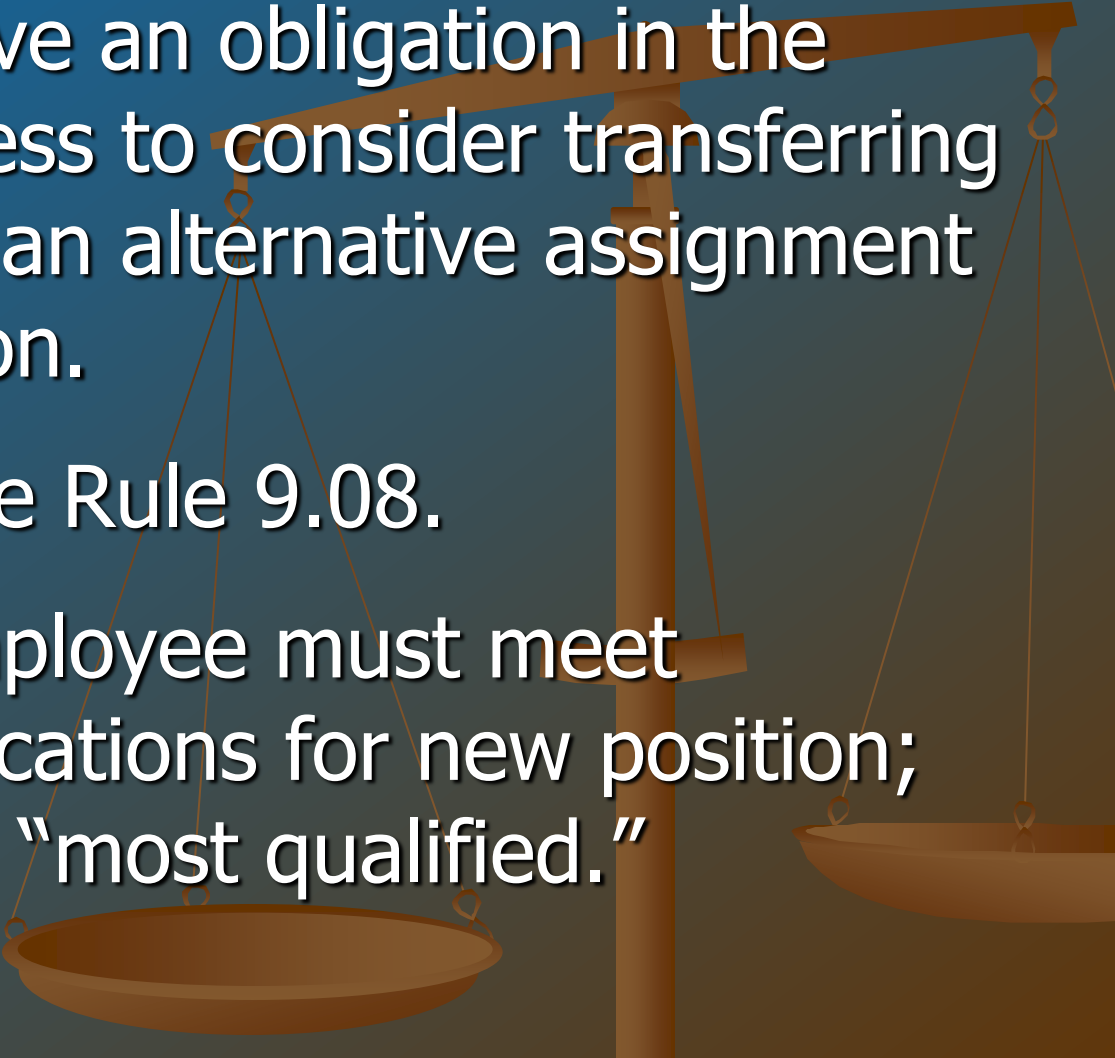


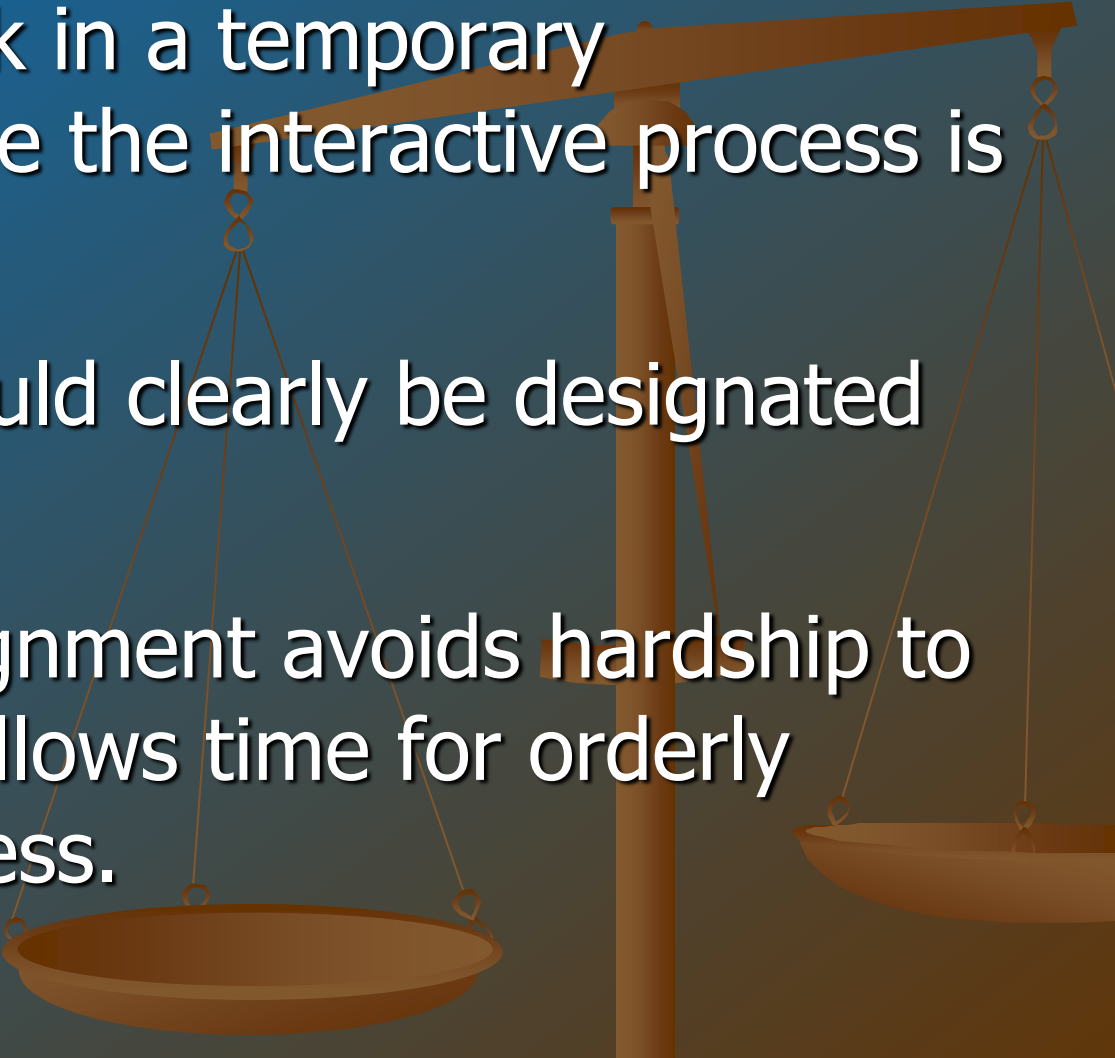
- The interactive process is a continuing process. The employer must continue to consider requests or information submitted by the employee.
- The employer must monitor the situation to determine whether any accommodation agreed upon is effective.
- If it is not, the employer must continue to engage in the interactive process and consider other possible accommodations.



- Employer must consider all information provided, but does not have to offer the exact accommodation requested so long as some reasonable accommodation is offered.



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- If an employee can no longer perform the essential functions of the former position, departments have an obligation in the interactive process to consider transferring an employee to an alternative assignment or vacant position.
  - See: Civil Service Rule 9.08.
  - For transfer, employee must meet minimum qualifications for new position; need not be the “most qualified.”

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- A disabled employee who can no longer perform his or her old job may be returned to work in a temporary assignment while the interactive process is proceeding.
  - Assignment should clearly be designated as temporary.
  - Temporary assignment avoids hardship to employee and allows time for orderly interactive process.



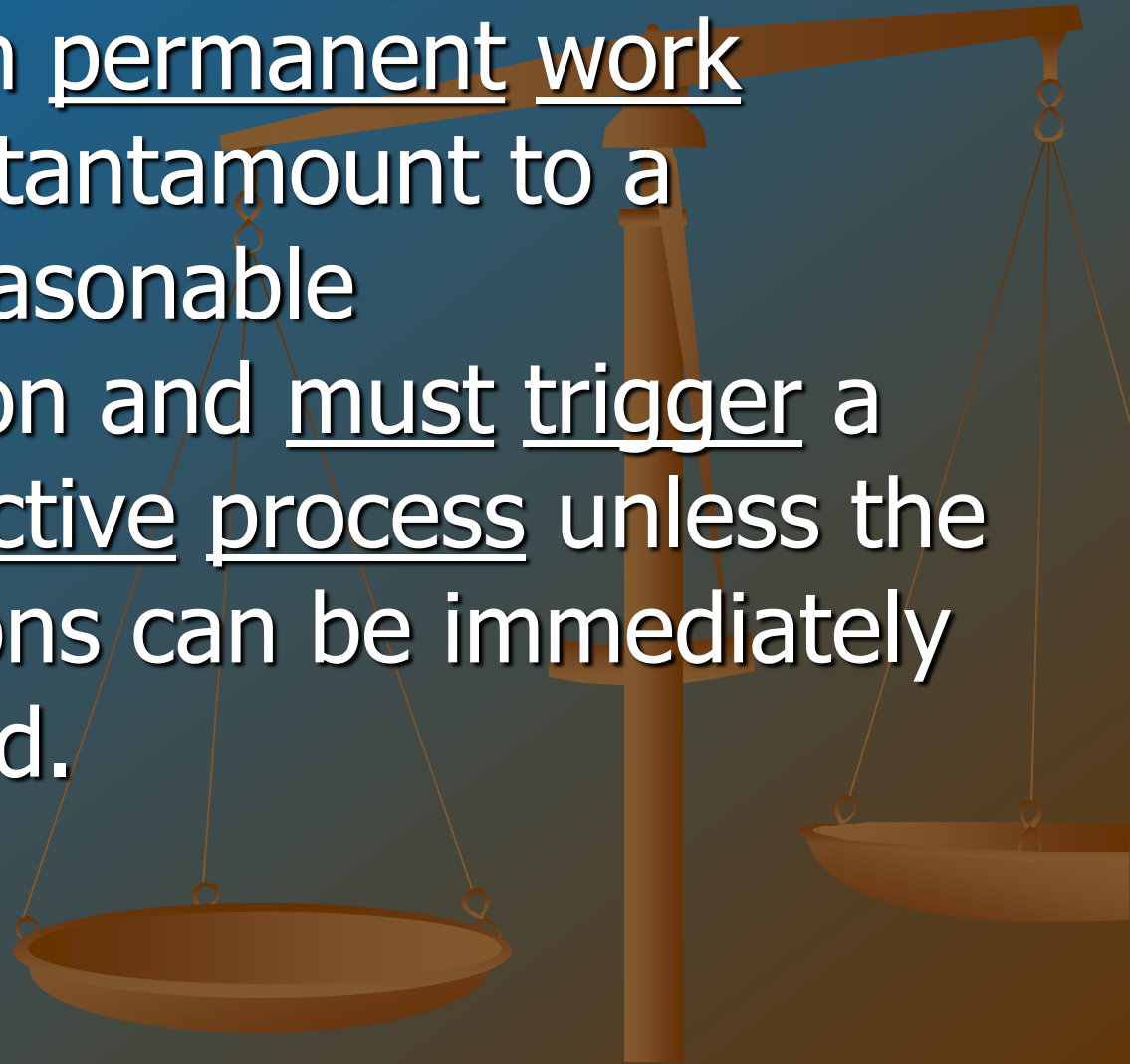
# WHAT IS A "KNOWN" DISABILITY?

The word "known" is broadly construed:

- Notification can be oral or written (no "magic words");
- Knowledge can come from the employee, other individuals, or observation;
- May be from an employee request or inquiry;
- Can include what the employer "should" know based on the facts available;
- Includes inability to return from FMLA or CFRA leave caused by the employee's own serious health condition.

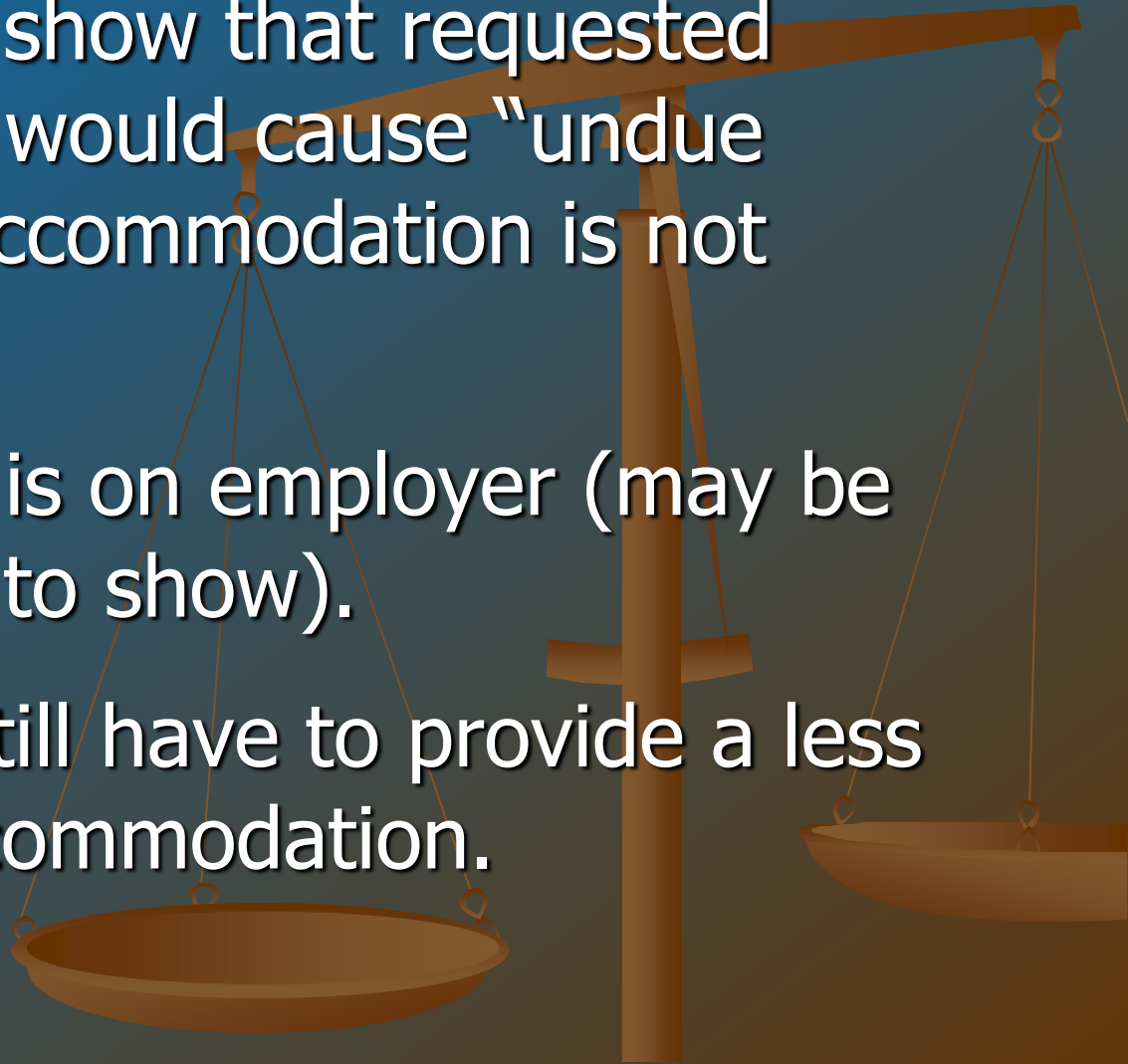


- Return of industrially injured employee with permanent work restrictions is tantamount to a request for reasonable accommodation and must trigger a prompt interactive process unless the work restrictions can be immediately accommodated.



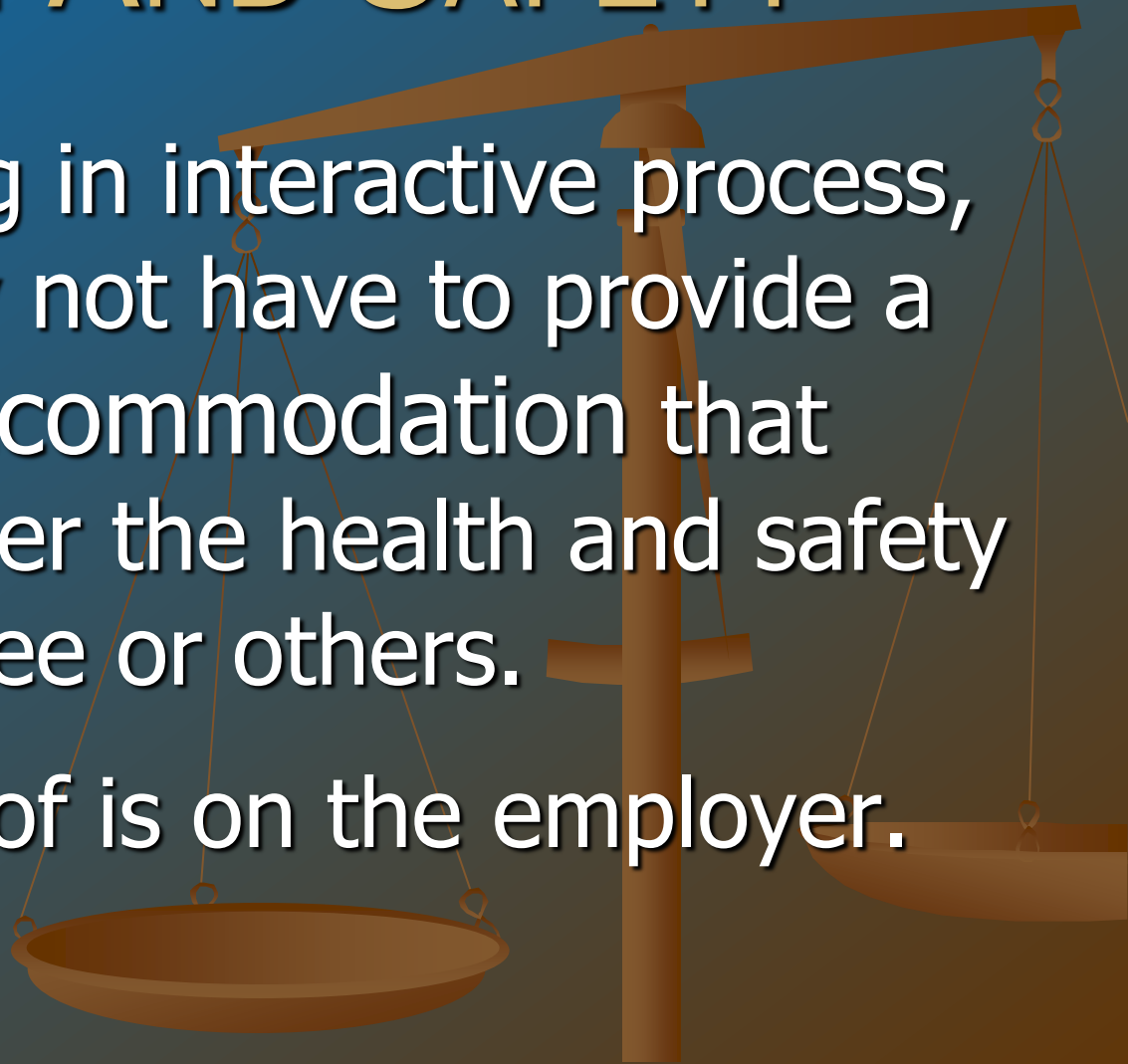
# UNDUE HARDSHIP

- If employer can show that requested accommodation would cause “undue hardship,” the accommodation is not required.
- Burden of proof is on employer (may be hard for County to show).
- Employer may still have to provide a less burdensome accommodation.

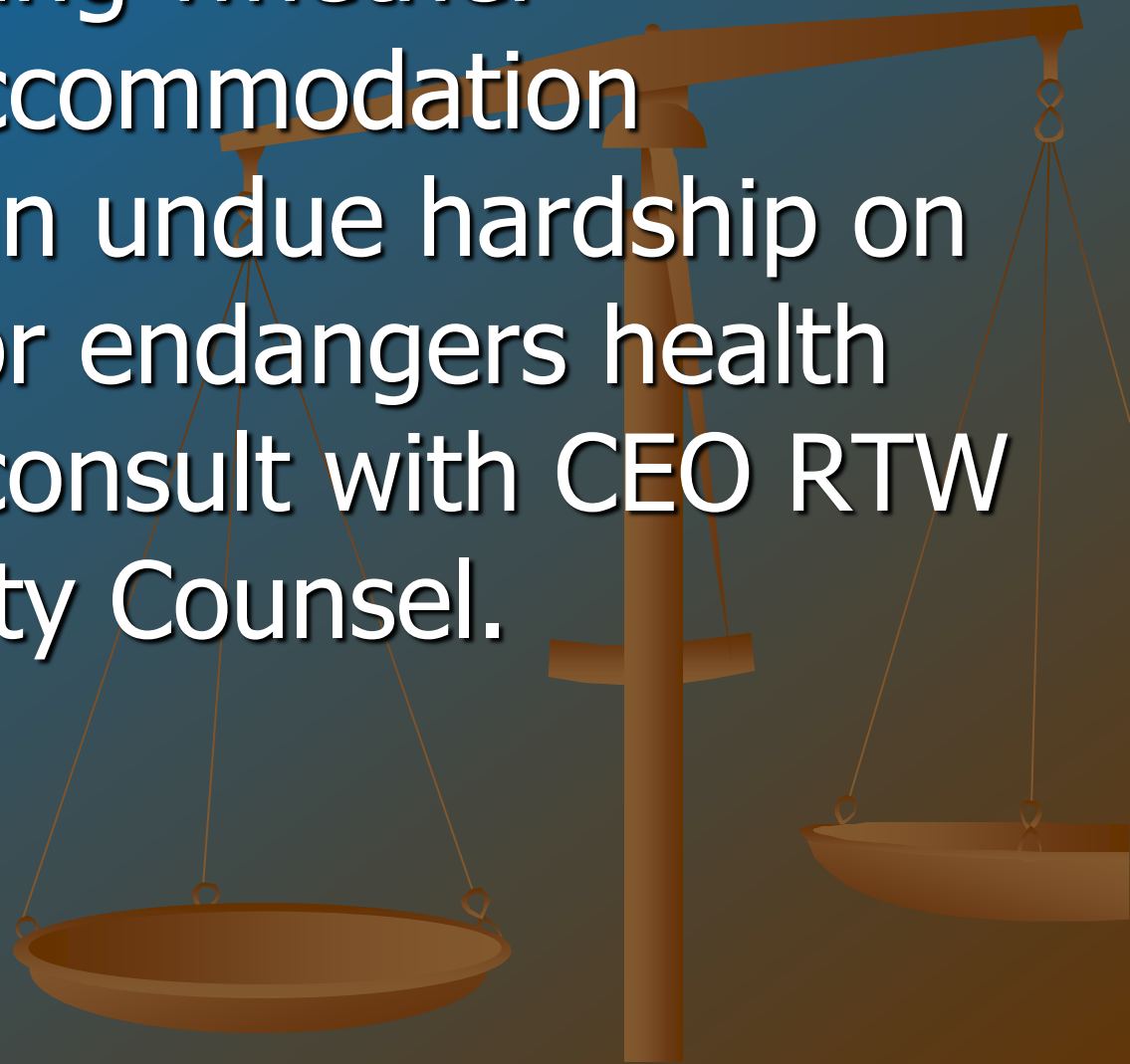


# “DIRECT THREAT” TO HEALTH AND SAFETY

- After engaging in interactive process, employer may not have to provide a reasonable accommodation that would endanger the health and safety of the employee or others.
- Burden of proof is on the employer.

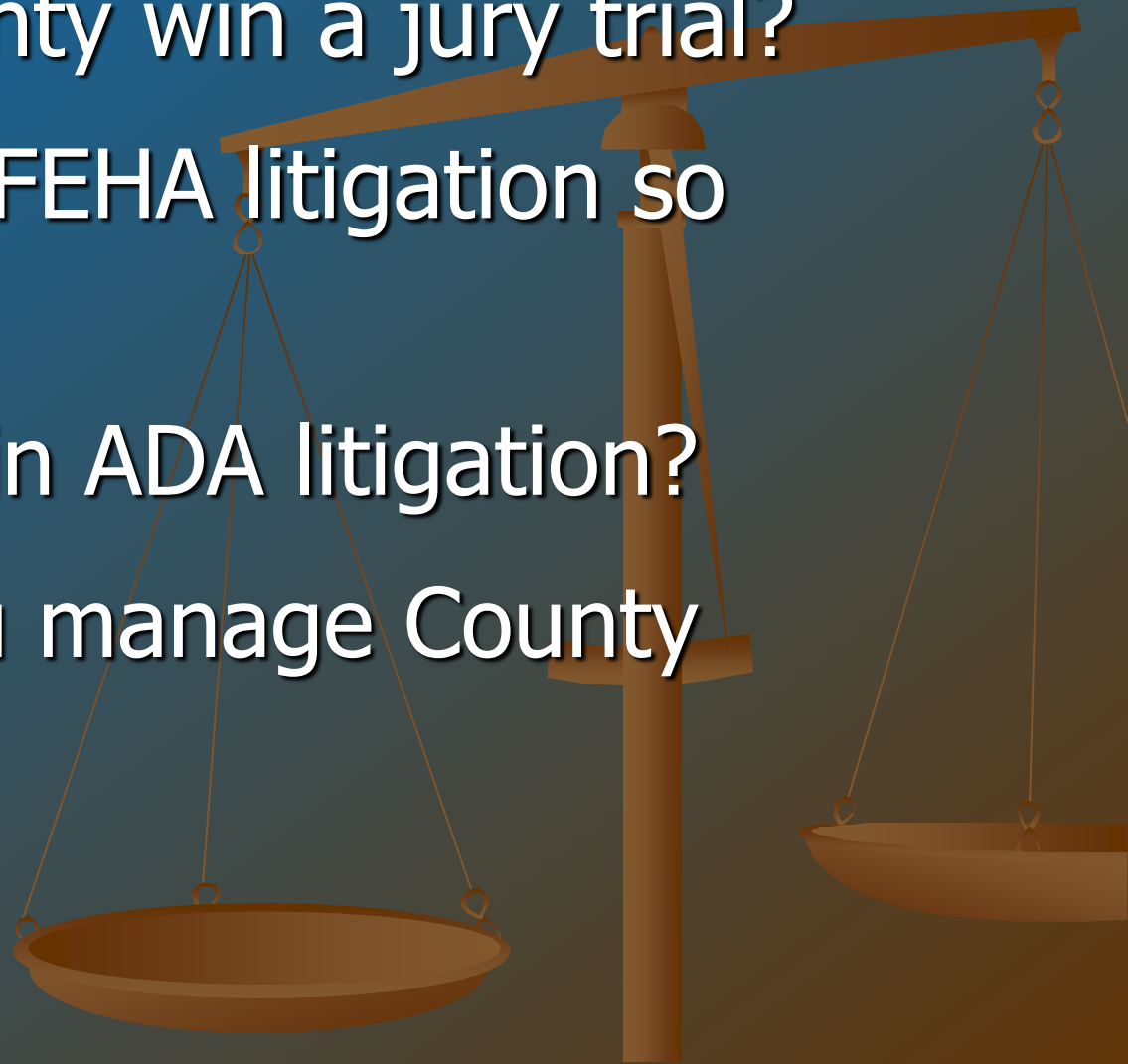


- Before deciding whether requested accommodation constitutes an undue hardship on the County or endangers health and safety, consult with CEO RTW and/or County Counsel.



# 4 QUESTIONS

1. Can the County win a jury trial?
2. Why is ADA/FEHA litigation so expensive?
3. What's new in ADA litigation?
4. How can you manage County workforce?



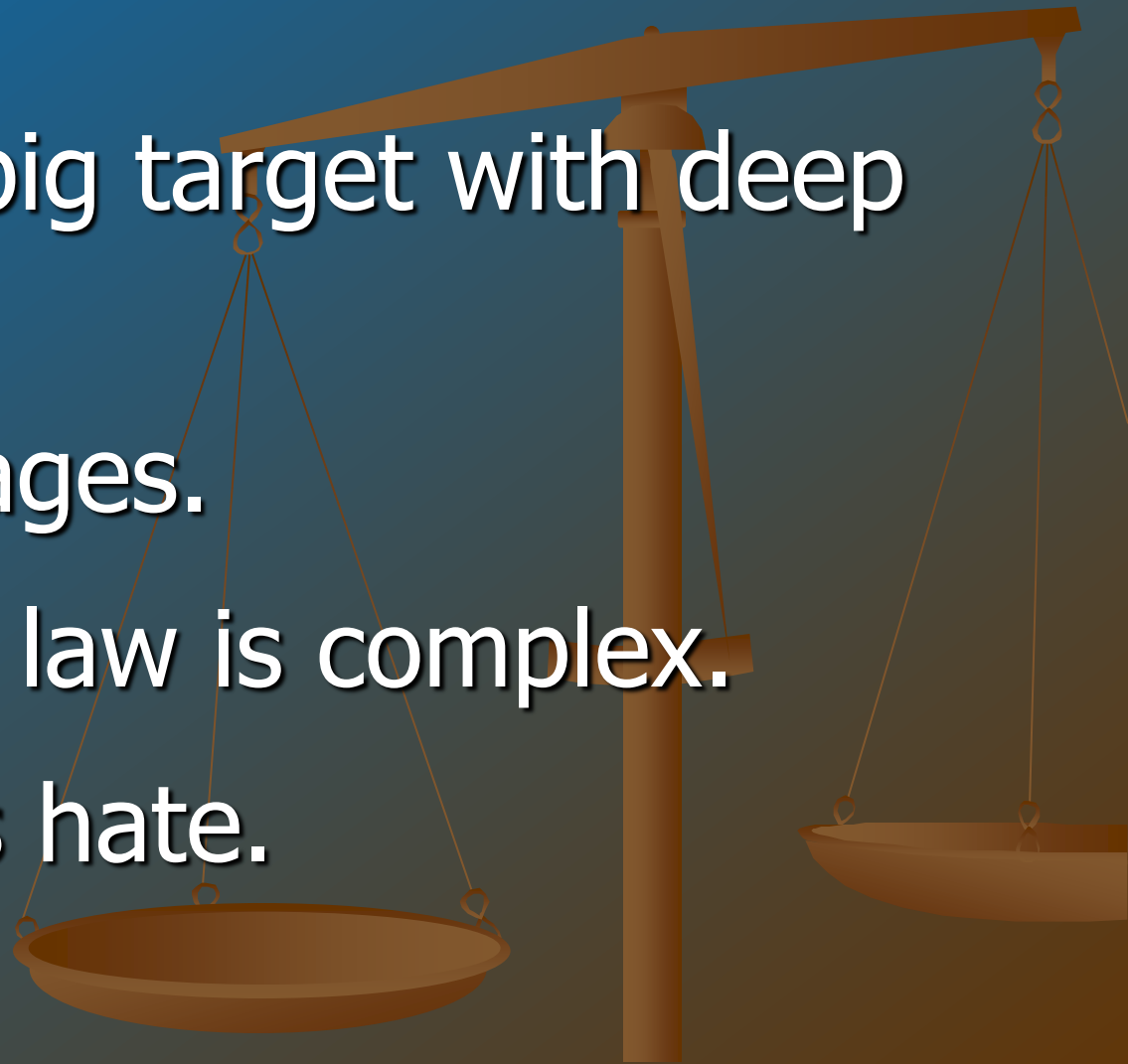
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# CAN THE COUNTY WIN A JURY TRIAL?





- Jurors tend to be employees, not employers.
- County is a big target with deep pockets.
- Negative images.
- Employment law is complex.
- Things juries hate.

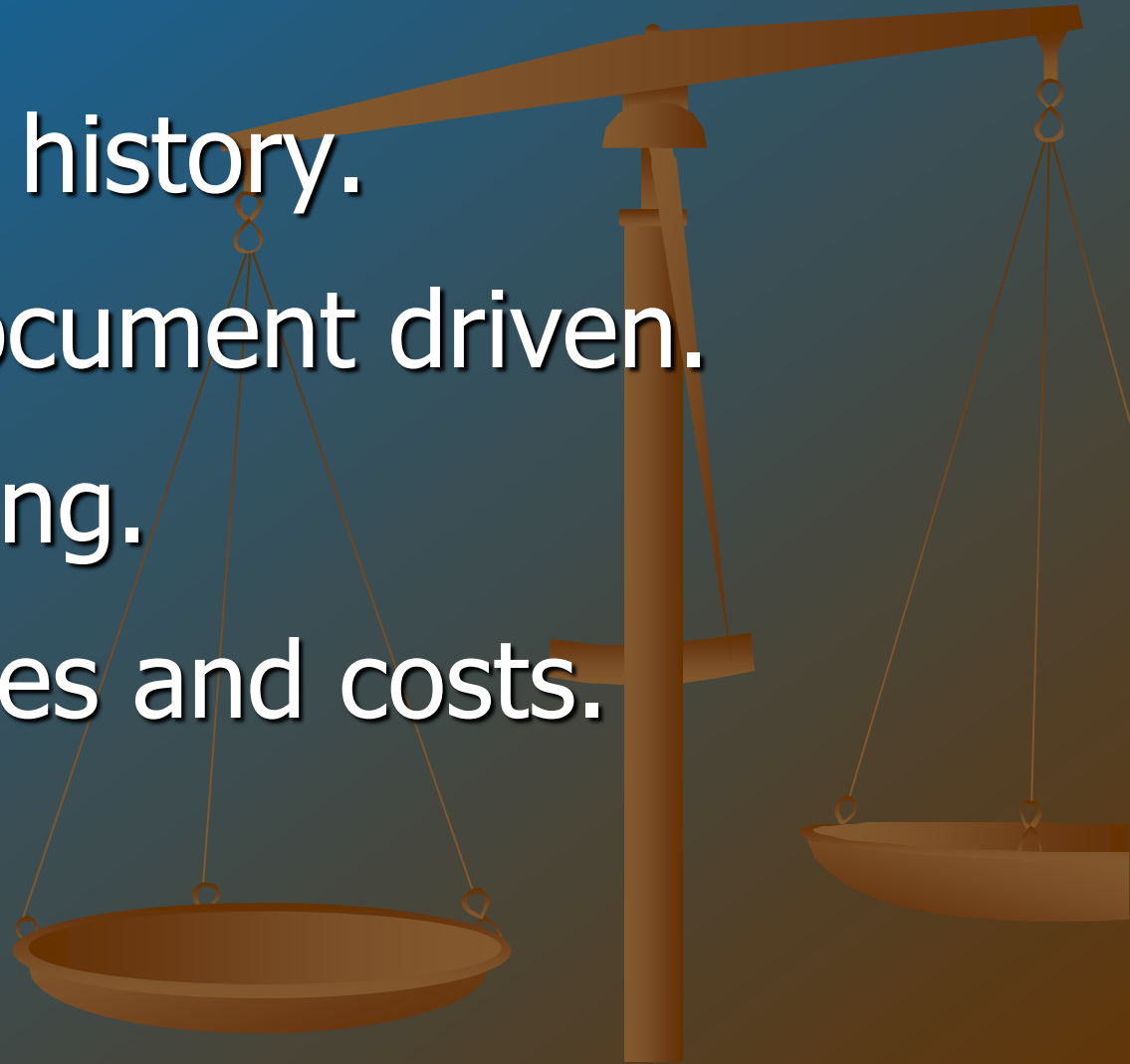


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WHY IS ADA/FEHA  
LITIGATION SO EXPENSIVE?



- ADA/FEHA cases are fact intensive.
- Employment history.
- Cases are document driven.
- Law is evolving.
- Attorneys' fees and costs.
- Disruption.

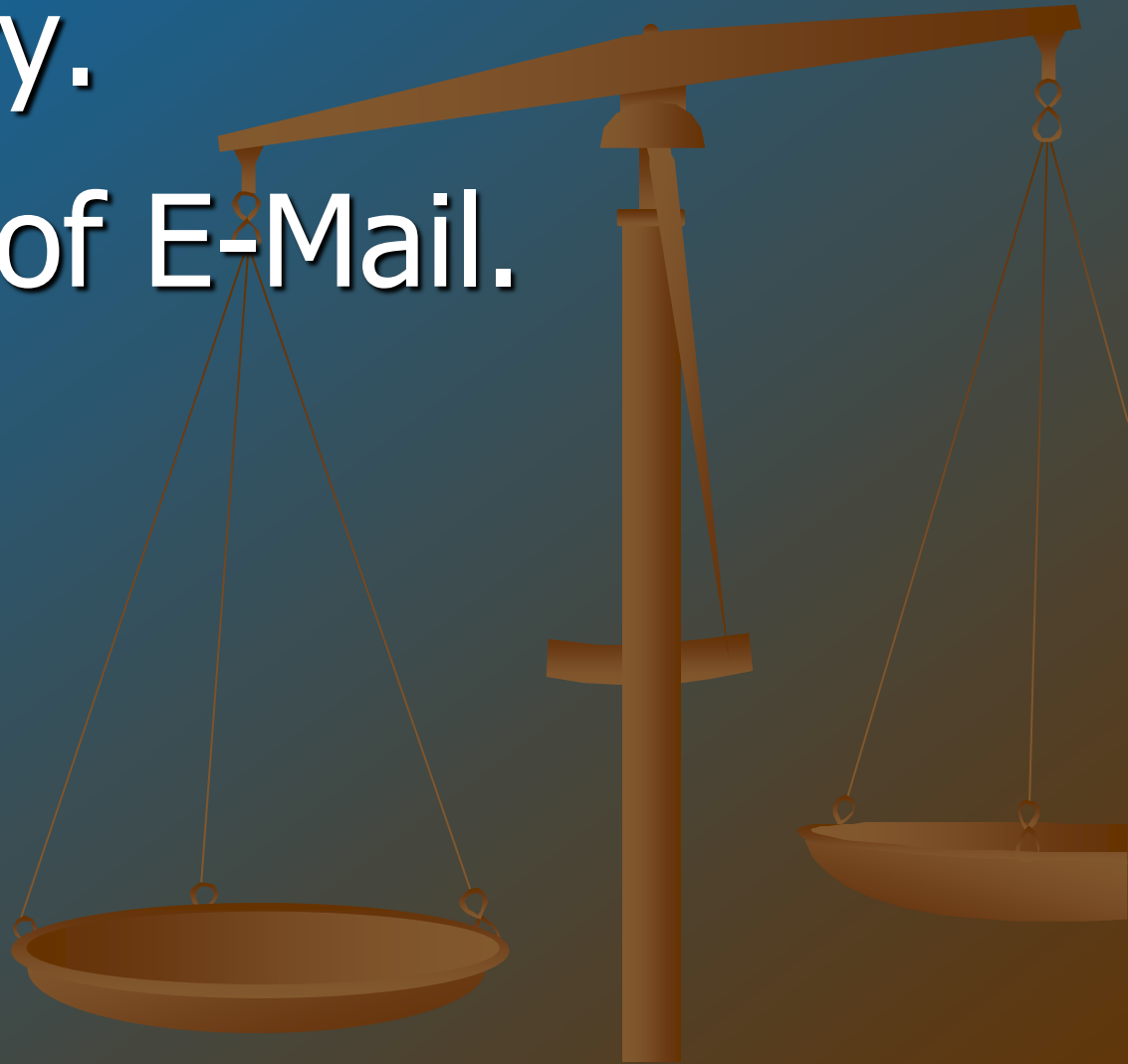


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# WHAT'S NEW IN ADA LITIGATION?



- E-Discovery.
- The Perils of E-Mail.



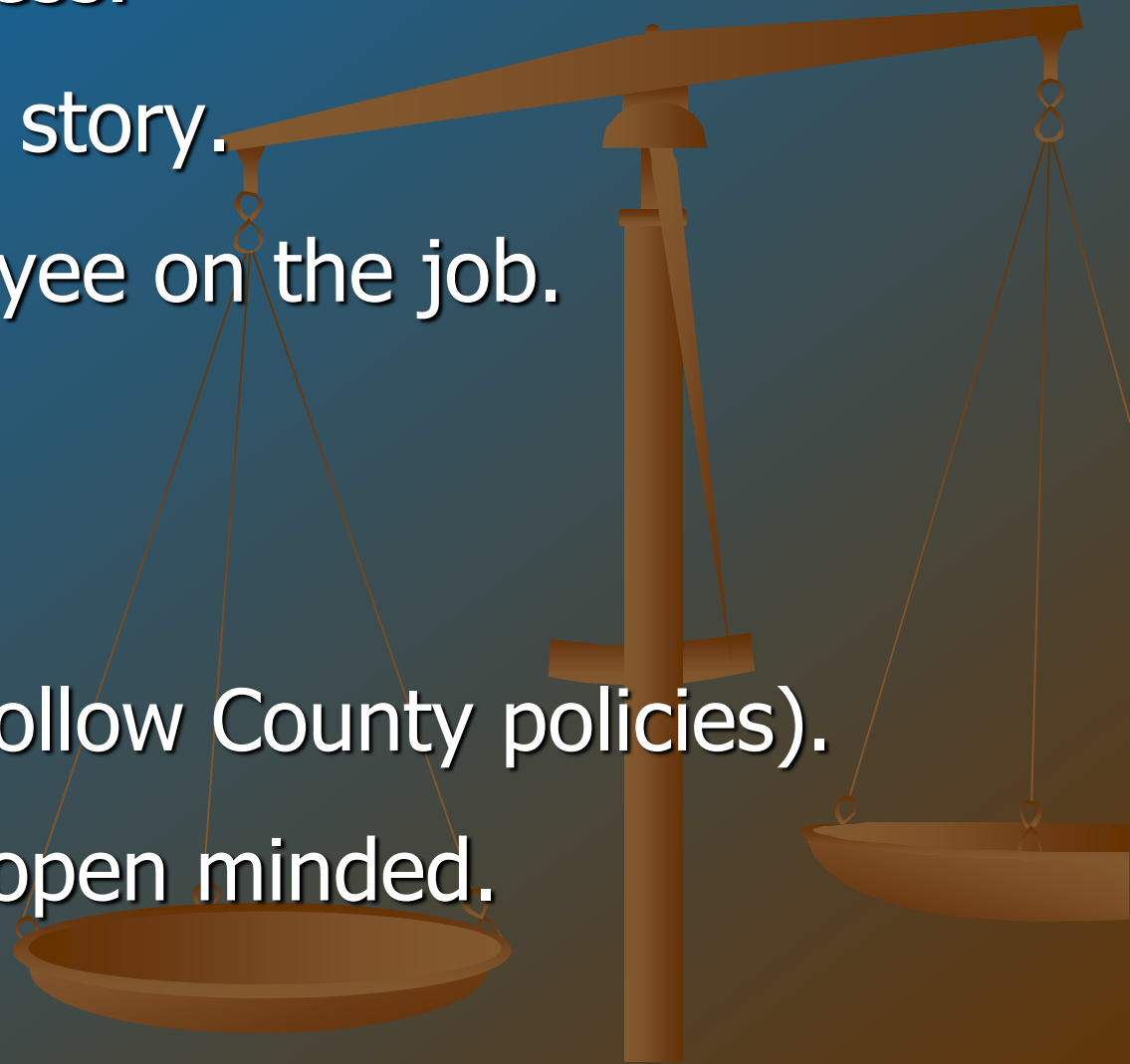


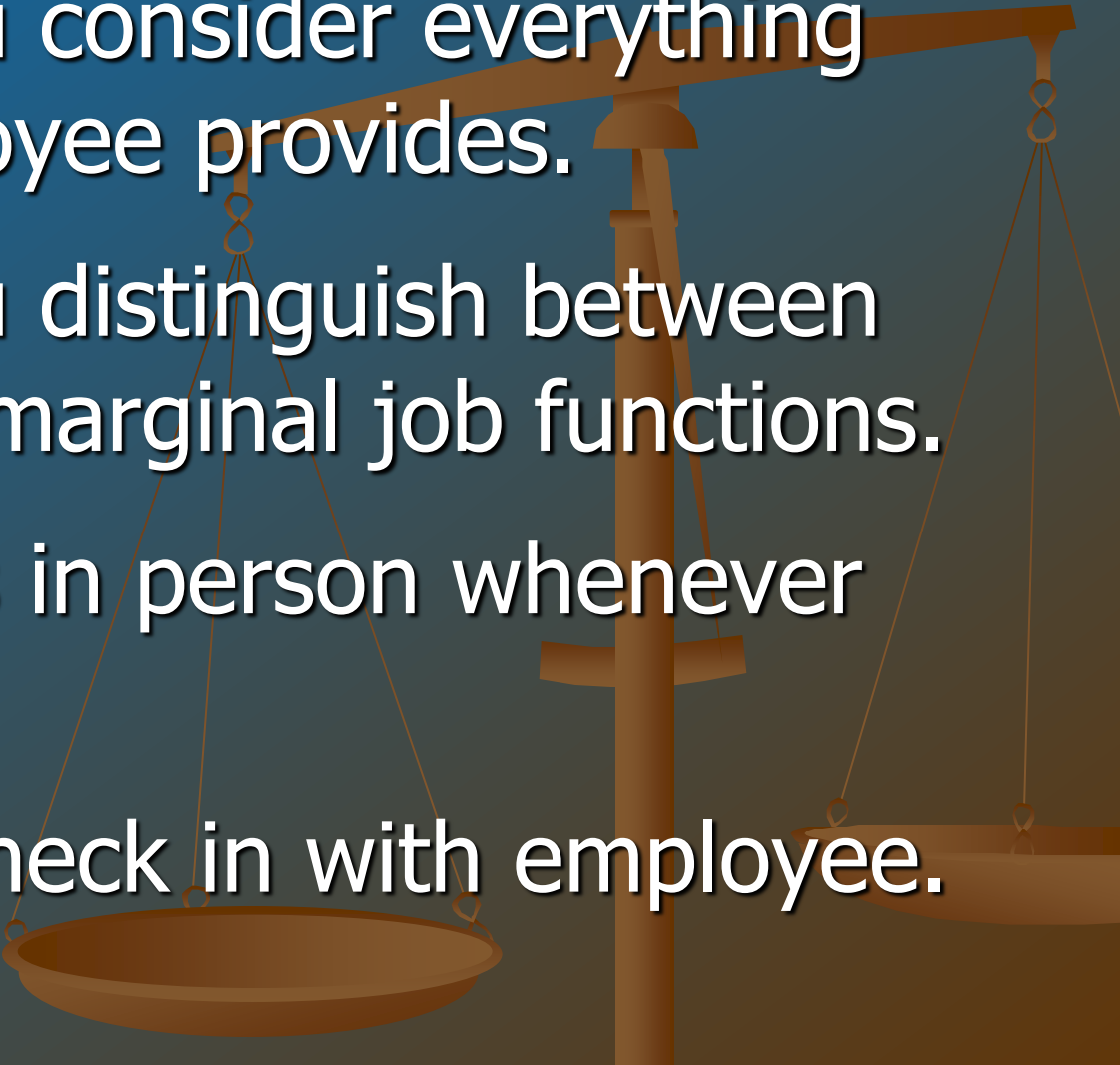
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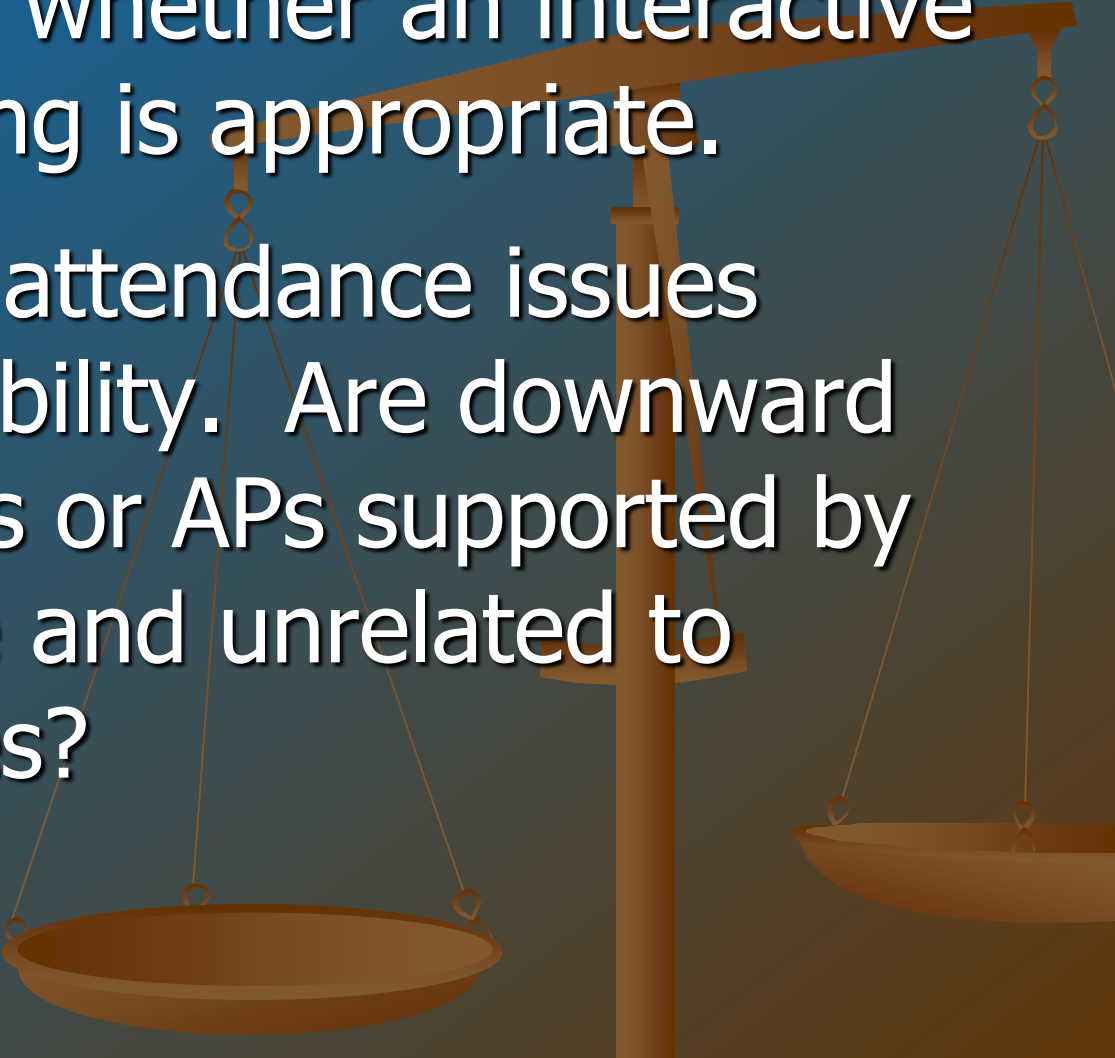
# HOW CAN YOU MANAGE COUNTY WORKFORCE?



- DOCUMENT, DOCUMENT, DOCUMENT the interactive process.
- Be able to tell a story.
- Keep the employee on the job.
- Be prompt.
- Be nice.
- Be consistent (follow County policies).
- Be flexible and open minded.



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- Be objective and neutral.
  - Make sure you consider everything that the employee provides.
  - Make sure you distinguish between essential and marginal job functions.
  - Hold meetings in person whenever possible.
  - Monitor and check in with employee.

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- Consider whether discipline is appropriate or whether an interactive process meeting is appropriate.
  - Watch out for attendance issues related to disability. Are downward changes in PEs or APs supported by facts/evidence and unrelated to disability issues?

# REMEMBER

- Use the resources available to you
  - CEO's RTW, HR, County Counsel, Job Accommodation Network ([askjan.org](http://askjan.org)). When in doubt, consult.
- Look for early resolution of disputes.

